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IN THE

Supreme Court of the United States

October Term, 1953

No. 10 Original.

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener.

STATE OF NEVADA,

Intervener.

Motion to Join, as Parties, the States of Colorado, New Mexico, Utah and Wyoming.

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Motion to Join, as Parties, the States of Colorado, New Mexico, Utah and Wyoming.

To the Honorable, The Chief Justice, and The Associate Justices of the Supreme Court of the United States:

Defendants State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, The City of Los Angeles, The City of San Diego and County of San Diego, by their

duly authorized attorneys, respectfully move this Court to order the joinder of the States of Colorado, New Mexico, Utah and Wyoming as additional parties to this action, and that, in furtherance of said order, a summons be issued to said states through their respective Governors and Attorneys General, directing them to appear as parties to this action at a time to be fixed in said summons, and that the Court direct that all pleadings filed herein be served on said officials.

This motion is made upon the grounds that each of said States is a necessary and indispensable party to this action, for the following reasons:

I.

The four absent States of Colorado, New Mexico, Utah and Wyoming are parties to the Colorado River Compact. Nevada sought leave to intervene in this case as a party to the Compact, and her motion was granted. The meaning and effect of the Colorado River Compact are in controversy in the present case. No decree determining the meaning and effect of that Compact, considered as a contract, can be fully effective in the absence of the other four parties to it. The principal issues of interpretation of the Colorado River Compact affecting the four absent States are stated in Defendants' Exhibit A, Summary of the Controversy, appended hereto and incorporated by reference as a part of this allegation as though here fully set out.

II.

Two of the absent States, New Mexico and Utah, have a dual interest with respect to the rights and obligations of parties to the Colorado River Compact, being States of the Upper Division (a status which they share with Colorado and Wyoming), as well as States which are in part within the Lower Basin (in common with Arizona, California and Nevada). Nevada sought leave to intervene not only as a party to the Compact but as an indispensable party to this action in her capacity as a Lower Basin State, and her motion was granted. The absent States of New Mexico and Utah, similarly to Nevada, are indispensable parties to the full resolution of the controversy among the States of the Lower Basin. As States lying in part within the Lower Basin, Utah and New Mexico participate in undetermined amounts in the right to beneficial consumptive use of a "common fund" of water available for use in the Lower Basin under the Colorado River Compact. No decree determining the rights of the present parties to this proceeding can be fully effective without the presence, as parties, of the other States having the right to participate in the use of said "common fund" of water.

III.

The four absent States, in like manner as Nevada and Arizona, are named as third party beneficiaries of the Statutory Compact between the United States and California evidenced by the Boulder Canyon Project Act and the California Limitation Act. The meaning and effect

of that Statutory Compact are in controversy in the present cause. No decree determining the rights and obligations of the United States and California as principals, and of Nevada and Arizona as two of the third-party beneficiaries of said Statutory Compact, can be fully effective in the absence of the other four beneficiaries. The principal issues of interpretation of that Statutory Compact which affect the four absent States are stated in Defendants' Exhibit A, Summary of the Controversy, appended hereto and incorporated by reference as a part of this allegation as though here fully set out.

IV.

The United States asserts claims "as against the parties to this cause," which are independent of, and adverse to, rights derived from or controlled by the Colorado River Compact. These claims of the United States affect all States in the Colorado River Basin, not merely the States of Arizona, California and Nevada. The absent States of Colorado, New Mexico, Utah and Wyoming are necessary and indispensable to the determination of these claims of the United States and of the effect thereof upon each of the seven States. The principal issues which arise from the claims of the United States and require the presence of all seven States are stated in Exhibit A, Summary of the Controversy, appended hereto and incorporated by reference as a part hereof as though here fully set out.

V.

This motion is based upon the records, files and pleadings herein.

Respectfully submitted.

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July 1954.

EXHIBIT A.

Summary of the Controversy

I. The Quantities of Water in Controversy.

The United States seeks to quiet title to rights to the use of water, consumptive and otherwise, "as against the parties to this cause," for federal purposes, in unstated amounts.

Arizona seeks to quiet title to the beneficial consumptive use of 3,800,000 acre-feet per annum of the waters of the Colorado River System (measured by "man-made depletion of the virgin flow of the main stream") and to enjoin California's right to permanently use any water in excess of approximately 3,800,000 acre-feet per annum (measured by "diversions less returns to the river"), that being the effect of (1) reducing 4,400,000 acre-feet of III(a) water by reservoir losses, and (2) denying California any permanent right to use excess or surplus waters.

California asserts a right to the beneficial consumptive use in California of 5,362,000 acre-feet per annum of the waters of the Colorado River System (measured by "diversions less returns to the river") under contracts with the United States, comprising 4,400,000 acre-feet of the waters apportioned by Article III(a) of the Colorado River Compact and 962,000 acre-feet per annum of the excess or surplus waters unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact.

Nevada seeks to quiet title to 539,100 acre-feet per annum (measured in part by both methods) of the beneficial consumptive uses apportioned by Article III(a) of

the Colorado River Compact, and to not less than a total of 900,000 acre-feet from all classes of water.

As the States differ in their definition of "beneficial consumptive use," their claims require restatement in terms of a common denominator in order to evaluate their effects. Thus:

The quantity to which Arizona seeks to quiet title, 3,800,000 acre-feet per annum, measured by the method she urges, "depletion of the virgin flow of the main stream occasioned by the activities of man," is equivalent to more than 5,000,000 acre-feet measured by consumption at the site of use, or "diversions less returns to the river," the standard established by the Boulder Canyon Project Act and asserted by California. The difference is due primarily to the fact that under Arizona's interpretation, the Compact deals with the virgin flow in the main stream only and that the use of water "salvaged by man" is not charged as a beneficial consumptive use, whereas under California's interpretation the Compact deals with the waters of the entire river system and such salvage is so charged.

Conversely, the aggregate of the California contracts, 5,362,000 acre-feet per annum, measured by "diversions less returns to the river," is equivalent to only about 4,500,000 acre-feet measured by "man-made depletion" (without charge for salvaged water). If Arizona's prayer should be granted, California's rights would be reduced to about 3,800,000 acre-feet per annum, measured by "diversions less returns to the river," or to about 3,000,000 acre-feet measured in terms of "depletion of the virgin flow of the main stream."

The impact of Nevada's claims on those of the other states is not readily evaluated.

II. Ultimate Issues.

The ultimate issues, in the sense of the results sought by each party, may be grouped as follows:

The United States.

Does the United States have rights, "as against the parties to this cause, to the use of water in the Colorado River and its tributaries" in the following categories?

(1) for consumptive use of all projects in the Lower Basin, which it asserts independently of any rights claimed by the States in which such projects are located;

(2) to fulfill its obligations arising from international treaties and conventions; but this involves, with respect to the burden of the Mexican Water Treaty, the obligations as between the States of the Upper Division and the States of the Lower Division under Articles III(c) and III(d) of the Colorado River Compact, and involves also the effect of the so-called "escape clause" of Article 10 of that Treaty, which allows reduction in the guaranteed deliveries to Mexico, in the event of extraordinary drought, in the same proportion as consumptive uses in the United States are reduced, "consumptive uses" being defined in Article 1 of the Treaty;

(3) to fulfill all its contracts for the delivery of water and electric power, *i.e.*, with or in Arizona, California, and Nevada; but it alleges that the water available is not sufficient to satisfy all these obligations;

(4) to fulfill the Government's obligations to Indians and Indian Tribes; but this involves not only the questions of the magnitude and priorities of these claims but the questions of whether or not they are

chargeable under the Colorado River Compact to the Basin and State in which such uses are made, what the obligation of the Upper Division States may be to release water for use by Indians in the Lower Basin, and what rights the United States may have to withhold water in reservoirs in the Upper Basin for use by Indians in both Basins;

(5) to protect its interests in fish and wildlife, flood control and navigation; but such rights as it may have for these purposes may require the impounding and release of water from reservoirs in both Basins, and not merely reservoirs bordering or within Arizona and California, and again involves the question of accounting under the Compact; and

(6) for use of the National Park Service, Bureau of Land Management, and Forest Service; but if the United States has claims "as against the parties to this cause" for these functions, such claims apply to all the waters of the Colorado River System in both Basins.

The adjudication of these claims of the United States requires consideration and resolution of questions of fact, referred to later; the power of the United States to impound and dispose of water independently of rights derived from the States; the extent of its obligations under treaties and contracts; the impact and effect of its treaties upon rights of domestic water users; how its claims to the use of water shall be measured; the location, magnitude and priorities of Indian claims, and claims for other alleged federal purposes; the extent to which its rights and obligations are controlled by the Colorado River Compact; and the extent to which its claims may be exercised *in futuro* in derogation of intervening rights and uses.

Arizona.

Is Arizona entitled to a decree:

(1) Quieting title to 2,800,000 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, substantially all to be taken from the main stream, and measured in terms of man-made depletion of the virgin flow of the main stream?

(2) Quieting title to all of the 1,000,000 acre-feet per annum by which the Lower Basin is permitted to "increase its use" by Article III(b) of the Colorado River Compact (notwithstanding the decision of this Court in *Arizona v. California et al.*, 292 U. S. 341 (1934)), to the exclusion of the other States of the Lower Basin, all to be taken from the waters flowing in the Gila River, and to be measured in terms of man-made depletion of the virgin flow of the main stream?

(3) Reducing California's right to the uses apportioned by Article III(a) of the Colorado River Compact to approximately 3,800,000 acre-feet per annum, in consequence of reservoir losses?

(4) Enjoining California's right to receive and permanently use, under its government contracts 962,000 acre-feet per annum, or any part thereof, in excess of 4,400,000 acre-feet per annum?

The determination of Arizona's claims involves: the questions of fact, later referred to; the standing of Arizona to seek a declaratory decree quieting title to a "block" of water for projects not yet constructed or authorized (about 1,600,000 acre-feet per annum of the 2,800,000 claimed from the main stream); the source of title to Arizona's claims to 2,800,000 acre-feet of III(a) water

and 1,000,000 acre-feet of III(b) water; the status of the uses on the Gila; the measurement of uses thereof and of the main stream; whether Arizona's status is that of a party to the Colorado River Compact or that of a third party beneficiary of the Statutory Compact between the United States and California, and if so, whether Arizona is bound by the interpretations placed thereon by the principal parties thereto in its formulation and administration; and the validity and effect of Arizona's water delivery contract with the United States.

Most of the questions posed by Arizona's claims revolve around the issue of whether the Gila River shall be treated as a part of the Colorado River System for all purposes, or shall receive special treatment in respect of (1) the identification of uses thereon with the waters referred to in Article III(b); (2) the corollary exemption of "rights which may now exist" on the Gila from any charge under Article III(a); and (3) the devaluation of the charge for beneficial consumptive uses from the quantity which is in fact consumed on the Gila (alleged by California to be about 2,000,000 acre-feet per annum) to the lesser quantity represented by the resulting depletion in the virgin flow of the main stream (alleged by Arizona to be about 1,000,000 acre-feet per annum).

California.

Are the contracts between the United States and the defendant public agencies of California for the storage and delivery of water valid and enforceable? Inasmuch as these contracts are, in terms, for permanent service but subject to the Colorado River Compact, the Boulder Canyon Project Act and the California Limitation Act, the issue is whether these enactments, considered together as a

Statutory Compact established by reciprocal legislation, authorize and permit the Secretary of the Interior to presently contract for the storage and delivery for permanent beneficial consumptive use in California, of 4,400,000 acre-feet per annum of the waters apportioned by Article III(a) of the Colorado River Compact plus one-half of the excess or surplus waters unapportioned by the Compact, including in such excess or surplus the "increase of use" permitted to the Lower Basin by Article III(b) of the Compact. The aggregate of these contracted quantities, subject to physical availability of the amounts of excess or surplus waters, which vary from year to year, is 5,362,000 acre-feet per annum.

The determination of California's claims involves; the questions of fact, later referred to; the extent to which rights have vested in both the United States and California under the Statutory Compact; whether Arizona is estopped by her previous conduct from asserting her present position; whether the limitation is net of reservoir losses; how California's uses shall be measured; whether California is chargeable with the use of salvaged water; the effect of California's appropriations, in their relation to the expressions "rights which may now exist" and "present perfected rights" in the Compact and Project Act; the definition of the Project Act term, "excess or surplus waters unapportioned by" the Colorado River Compact; the availability of such waters for permanent service; the intent of Congress with respect to the waters referred to in Article III(b); and the relation between California's contracts and the later agreements which the Secretary of the Interior has entered into with others.

Nevada.

Is Nevada entitled to a decree?

(1) Quieting title to 539,100 acre-feet per annum of the beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact?

(2). Reserving for a future agreement the disposition of the use of the 1,000,000 acre-feet referred to in Article III(b) of the Colorado River Compact, and preserving to Nevada an equitable share thereof?

(3). Assuring Nevada the ultimate beneficial consumptive use of not less than 900,000 acre-feet per annum, from all classes of water?

The determination of Nevada's claims requires the consideration and resolution of: the questions of fact later referred to; the questions of interpretation previously mentioned; the question of whether Nevada's share of III(a) waters has been determined or limited to 300,000 acre-feet per annum; whether, as to stored waters, Nevada may claim any quantity in excess of her contracts with the United States; and the source of title to her claims to 539,100 acre-feet per annum of III(a) water and not less than 900,000 acre-feet per annum from all sources.

Interests of Other States.

There remains the question whether the claims of the United States, Arizona, California, and Nevada can be effectively determined without concurrently determining the rights and obligations of Utah and New Mexico with respect to the waters of the Lower Basin, and the rights and obligations of those states and Colorado and Wyoming with respect to other waters of the Colorado

River System, to the extent that they are affected by the issues in controversy here.

In more detail, these "ultimate issues" depend upon the resolution of the following questions of fact and of the interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact between the United States and California, and the Mexican Water Treaty.

III. Factual Issues.

There are substantial issues of fact, raised by the pleadings to date. These include, but are not limited to, determination of:

(1) the investments and obligations undertaken by the parties in the construction of works and in the performance of their contracts with the United States, and the investments and obligations undertaken by the United States in reliance upon such contracts;

(2) the location, magnitude and priorities of the water rights necessary to enable the United States to perform its obligations to Indians and Indian Tribes pursuant to Article VII of the Compact;

(3) the requirements of the United States for (a) flood control, (b) navigation, (c) fish and wildlife, and (d) the other claims which it makes;

(4) the quantities of water physically available for beneficial consumptive use in the Lower Basin, assuming full use by the Upper Basin of its Compact apportionment, full regulation of the supply available to the Lower Basin, and full performance of the Mexican Water Treaty;

(5) the uses, present and potential, on the main stream and on each tributary, determined as of the place of use, as California contends is the proper method and the effect of those uses in terms of man-made depletion of the virgin flow of the main stream, as Arizona contends is the proper method;

(6) the quantities of water "salvaged" by the activities of man, on the main stream and on the tributaries;

(7) reservoir losses, present and potential, gross and net;

(8) appropriative rights, priorities, and uses thereunder, on the main stream and tributaries;

(9) the extent and place of use of "rights which may now exist" and which, under Article III(a) of the Compact, are to be charged as uses of water apportioned by Article III(a), and of "rights which may now exist" in California, within the meaning of Section 4(a) of the Project Act; and

(10) the extent and place of use of "present perfected rights" protected by Article VIII of the Compact and directed by the Boulder Canyon Project Act to be satisfied in the operation and management of the Project.

IV. The Issues of Interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact, and the Mexican Water Treaty.

Questions relating primarily to Article III(a) of the Colorado River Compact include the following: Whether the Colorado River Compact deals only with the main stream or treats with Colorado River System waters wherever they may be found; whether the uses apportioned by Article III(a) to the Lower Basin are to be taken only from "water present in the main stream and

flowing at Lee Ferry," as Arizona contends, or from the tributaries as well, as California and Nevada contend; whether the 7,500,000 acre-feet referred to in Article III(a) is related to the 75,000,000 acre-feet referred to in Article III(d), as Arizona contends, or whether the latter figure includes excess or surplus waters unapportioned by the Compact as California contends; by what process Arizona claims to have acquired an apportionment of 2,800,000 acre-feet of III(a) water, to be taken from the main stream; whether the apportionment of 7,500,000 acre-feet "per annum" is a statement of a maximum, or of an average, and, if the latter, over what period of years; the definition and measurement of "beneficial consumptive use"; the accounting for water added to and withdrawn from storage on the main stream and tributaries; whether the use of water salvaged by man on the main stream and tributaries is to be charged under the Compact; the definition of "rights which may now exist," which are to be included in charges to water apportioned by Article III(a) and their magnitude on the main stream and tributaries; the date to which this last expression refers; whether, in the absence of a compact among the Lower Basin States, the division of water among them is to be affected by appropriative rights, i. e., "rights which may now exist"; whether Indian rights, and other federal claims to consumptive use, are included within that expression and are to be charged under the Compact; whether reservoir losses are chargeable as beneficial consumptive uses, and if so, their classification under the Compact and their relation to other uses.

Questions relating primarily to Article III(b) of the Colorado River Compact include the following: The questions relating to the definition of "beneficial consump-

tive use" and "per annum" previously stated in connection with Article III(a); whether the "increase of use" permitted to the Lower Basin by Article III(b) is an apportionment in perpetuity as in Article III(a), as Arizona contends, or a license to acquire rights by appropriation and contracts under the Project Act in excess or surplus waters unapportioned by the Compact, as California contends; whether this right to increased use is identified solely with the water found flowing in the Gila River, as Arizona contends, or is identified with the first 1,000,000 acre-feet of increased use (above 7,500,000) per annum throughout the Lower Basin, as California and Nevada contend; whether this right is available to all five States of the Lower Basin, or to Arizona alone, as she contends (notwithstanding the decision of this Court in *Arizona v. California et al.*, 292 U. S. 341 (1934)); the status of uses in New Mexico on the Gila; the status of uses on other tributaries; and to what degree reservoir losses are chargeable to this increase of use. Reference to the relation of the Mexican Treaty burden to the uses under Article III(b) appears below in connection with Article III(c).

Questions relating primarily to Article III(c) of the Colorado River Compact include the following: Whether the waters to be supplied Mexico are "apportioned" thereby (this bears upon the determination of the meaning of the expression "excess or surplus waters unapportioned by" the Colorado River Compact, appearing in the Boulder Canyon Project Act, *infra*); whether, if the quantities in excess of those specified in Articles III(a) and III(b) are insufficient to supply the deliveries to Mexico, the burden, with respect to the Lower Basin, falls first upon the uses referred to in Article III(b), as California

contends, or upon those referred to in Article III(a), as Arizona contends; and the relation of the "escape clause" in Article 10 of the Treaty, which permits reduction in deliveries to Mexico in case of extraordinary drought in proportion to the reduction in consumptive uses in the United States. The relation of Article III(c) to Articles III(d) and III(a), with respect to the obligations of the Upper Division States, is referred to below in connection with Article III(d).

Questions relating primarily to Article III(d) of the Colorado River Compact include the following: As a corollary to one of the questions stated with reference to Article III(a), whether the 75,000,000 acre-feet referred to in Article III(d) is related to the 7,500,000 acre-feet apportioned by Article III(a) to the Lower Basin, or whether the 75,000,000 acre-feet include excess or surplus waters available for delivery to Mexico or use in the Lower Basin; the resulting effect on the obligation of the States of the Upper Division stated in Article III(c) to furnish additional water to meet the deficiency if surplus above the quantities specified in Articles III(a) and III(b) is insufficient to supply Mexico; and whether the Lower Basin is entitled to demand release of this 75,000,000 acre-feet notwithstanding the consequent inability of the Upper Basin to make beneficial consumptive use of 7,500,000 acre-feet per annum.

Questions relating primarily to Article III(e) of the Colorado River Compact include the following: Whether, if excess or surplus waters are appropriated (or contracted for) in the Lower Basin, their release from storage in the Upper Basin may be required; whether, if Indian uses are not subject to the Colorado River Compact,

the United States may require release of water from reservoirs in the Upper Basin to satisfy them, in addition to the water which the States of the Upper Division are required to release in performance of Articles III(c) and III(d) of the Compact; so also with respect to the other federal claims asserted by the United States "as against the parties to this cause," for use of water in the Lower Basin.

Questions relating primarily to Articles III(f) and III(g) of the Colorado River Compact include the following: Whether the provisions in these articles with reference to a compact to be made after October 1, 1963, are permissive or mandatory; whether, in the light of the Statutory Compact, these provisions preclude the acquisition of rights in excess or surplus waters by appropriation and by contract with the United States in the interim, subject only to further apportionment as between Basins by such a future compact; and whether, in the event of competing interstate claims to such excess or surplus waters, in the absence of a compact apportioning them, priority of appropriation, including contracts with the United States, controls.

Questions relating to Article VII of the Colorado River Compact include the following: Whether uses by Indians are subject to the Colorado River Compact; whether Indian uses are chargeable under the Compact to the Basin and the State in which they are situate; if not, whether they are prior and superior to the apportionments made by the Compact, or are in competition with appropriations of others which are subject to the Compact; the location, magnitude, and asserted priority of Indian claims; their effect upon the quantities available to non-

Indian users under Articles III(a), III(b), etc.; their effect on the distribution of the Mexican Treaty burden; and their effect on the obligations of the States of the Upper Division under Articles III(c) and III(d).

Questions relating primarily to Article VIII of the Colorado River Compact include the following: The date to which the expression "present perfected rights" relates, *i.e.*, 1922, 1929, or some other date; the definition of said term; whether such definition is to be determined under the law of the State under which the right arose; whether the assurance against impairment extends to quality as well as quantity; the extent of these rights in each State; their relation to the expression "rights which may now exist," as used in Article III(a) of the Compact and Section 4(a) of the Project Act; and the impact of reservoir losses when present "perfected rights" attach to, and are satisfied from stored waters, pursuant to the direction in Article VIII.

Questions relating primarily to the Boulder Canyon Project Act and the resulting Statutory Compact between the United States and California include the following: Whether the alternative consent given in the Project Act to a Seven-State or Six-State Compact became final on June 25, 1929, in establishing the latter; whether Arizona could, or did, effectively ratify a Seven-State Compact thereafter; if so, whether the Statutory Compact authorized by the Project Act as a corollary to a Six State Compact remains in effect; if does, whether Arizona can claim the benefits of both; whether the Statutory Compact authorized contracts to be made with the California defendants for the permanent service (in addition to 4,400,000 acre feet of III(a) waters) of one-half of

the excess or surplus waters unapportioned by the Compact for use in California; whether it included therein the waters referred to in Article III(b), or precluded California from use of such waters; whether the "excess or surplus," of which California may use one-half, is to be reckoned before or after deduction of the quantity required to be delivered to Mexico; the effect on California's right to "excess or surplus" of a future compact apportioning such waters; whether the limitation "for use in California" is net of reservoir losses, or is subject to further reduction in consequence of such losses; whether the definition of consumptive uses applicable to California is applicable to Arizona, and vice versa; whether California is free to make use of salvaged waters without charge under the Compact or the Limitation Act; the effect of California's appropriations; the meaning and effect of the reference to "rights which may now exist" in Section 4(a) of the Project Act; the extent of California's "present perfected rights" as referred to in Section 6 of the Project Act; whether by the Project Act, or otherwise, the shares of Nevada or Arizona in the waters of the Colorado River System have been determined; and the construction and effect of the water delivery contracts held by those States.